Foundations of Government Name\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
First Amendment Synopsis  
Mr. Faulhaber

**The First Amendment says:**  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people to peaceably assemble and to petition the government for a redress of grievances.

Directions: Read and Highlight the background materials.

**What the First Amendment protects — and what it doesn't**

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The First Amendment is a mere 45 words. But it's still giving lawmakers and judges fits  227 years after its adoption.

The government can't establish religion, but federal, state and municipal officials can [open meetings with a prayer](https://www.usatoday.com/story/news/nation/2014/05/05/supreme-court-government-prayer-new-york/4481969/).

The government can't block religious exercise, but it's trying to [ban travelers from majority-Muslim countries](https://www.usatoday.com/story/news/politics/2018/01/19/supreme-court-issue-final-verdict-trump-travel-ban/1038126001/) in the name of national security.

It can't restrict free speech — not even hate speech or flag-burning or protests of military funerals. But don't try shouting "Fire!" in a theater or[threatening folks on Facebook](https://www.usatoday.com/story/news/nation/2015/06/01/supreme-court-facebook-threat/23901307/).

It can't muzzle the media, unless it concerns outright lies made with malicious intent.

And peaceful protests are protected, but that doesn't mean the Secret Service can't push you around a little in order to [protect the president](https://www.usatoday.com/story/news/politics/2014/05/27/supreme-court-bush-protest-speech/9172707/).

Sound confusing? Here's your guide to the First Amendment, circa 2018:

Public protests  
  
If [white nationalists and neo-Nazis](https://www.usatoday.com/story/news/politics/2017/08/16/cross-burning-funeral-protests-hate-speech-enjoys-broad-protection/573232001/) can march through the college town of Charlottesville, Va., and win backing from the American Civil Liberties Union, the rights of demonstrators are in safe hands.  
  
What remains in doubt: whether such protests can be accompanied by displays of weapons, even in states that permit firearms to be carried in public. That raises the potential for violence, which public officials have the authority to prevent.  
  
In a series of cases dating back to the 1960s, the Supreme Court has struck down restrictions on so-called "hate speech" unless it specifically incites violence or is intended to do so.  
  
The First Amendment, the justices have said, protected neo-Nazis seeking to march through heavily Jewish Skokie, Ill., in 1977. It protected a U.S. flag burner from Texas in 1989, three cross burners from Virginia in 2003 and homophobic funeral protesters in 2011.  
  
Even symbols of intimidation, such as torches carried by some marchers in Charlottesville, are protected unless they have specific targets. Justice Clarence Thomas dissented in the cross-burning case, reasoning that "those who hate cannot terrorize and intimidate," but he was on the losing end of an 8-1 vote.

Public speakers  
  
If right-wing demonstrators are protected by the First Amendment, so too are right-wing speakers. The Supreme Court made that clear in 1969 when it protected a Ku Klux Klan member decrying Jews and blacks in Ohio because he did not pose an imminent threat.

[Richard Spencer](https://www.usatoday.com/story/news/2018/03/12/alt-right-leader-richard-spencer-says-his-rallies-arent-fun-anymore/416579002/), a white nationalist who has traveled the country on a controversial "alt-right" speaking tour, is but the most recent example. He's been allowed to speak, along with counter-demonstrators aligned with a left-wing coalition known as Antifa.

Spencer is better off giving sparsely attended speeches and facing opponents in Florida, Michigan and Virginia than he would be overseas. He's been banned from visiting large portions of Europe and Great Britain by government officials who said his speeches foster hatred. Under the First Amendment, those bans would not stand.

“The American free speech tradition holds unequivocally that hate speech is protected, unless it is intended to and likely to incite imminent violence,” says Jeffrey Rosen, president of the National Constitution Center in Philadelphia.

Adds Justice Stephen Breyer: "It's there for people whose speech you don't like."

Censorship  
  
Speech isn't restricted to the spoken or written word. The First Amendment also protects movies and TV, art and music, yard signs and video games, clothing and accessories.

The Supreme Court has ruled in favor of video games depicting the slaughter of animals. It has upheld derogatory trademarks, such as those promoting [The Slants](https://www.usatoday.com/story/news/politics/2017/06/19/supreme-court-upholds-offensive-trademarks-form-free-speech/100618478/), an Asian-American rock band. When a Pennsylvania school district tried to stop students from wearing breast cancer awareness bracelets reading "I (Heart) Boobies," the court refused even to hear the case.

But as usual, there are exceptions. When the speaker is the government, the court has allowed for censorship — such as when Texas refused to permit specialty license plates displaying the [Confederate flag](https://www.usatoday.com/story/news/nation/2015/06/18/supreme-court-license-plates/27605915/). The justices reasoned that the government, not the motorist, was doing the talking.  
  
Compelled speech  
  
The First Amendment gives you the right to speak out — as well as the right "to refrain from speaking at all," Chief Justice Warren Burger wrote in 1977. That signaled a win for a New Hampshire couple who covered up part of their home state's motto, "Live Free or Die," on license plates.

The doctrine is up for grabs in three major Supreme Court cases this term. It appears likely the justices will rule that an Illinois state employee cannot be compelled to [contribute to his local union](https://www.usatoday.com/story/news/politics/2018/02/26/public-employee-union-fees-raise-ire-supreme-court-but-key-justices-remain-silent-direction/373048002/). They also seem inclined to say that California cannot force [anti-abortion pregnancy centers](https://www.usatoday.com/story/news/politics/2018/03/20/supreme-court-skeptical-california-law-requiring-information-abortion/441640002/) to inform clients where they can get an abortion.

The third case is a closer call: Must a [deeply religious Colorado baker](https://www.usatoday.com/story/news/politics/2017/12/05/speech-religion-lgbt-rights-collide-supreme-court/921458001/) use his creative skills to bake a cake for a same-sex couple's wedding? Here the court seems split.

"The case isn't about same-sex marriage, ultimately. It isn't about religion, ultimately," says Jeremy Tedesco, a lawyer with Alliance Defending Freedom, which represents Jack Phillips. "It’s about this broader right to free speech, the right to be free of compelled speech.”  
  
Campaign spending  
  
If you want to put free speech rights to work in politics, you're in luck. The Supreme Court equates campaign spending with speech

Say you're a wealthy individual, or you run a corporation that wants to spend unlimited amounts in this year's elections. As long as you do not coordinate your spending with a candidate or political committee, you're home free.

And while there are anti-corruption limits on how much you can donate directly to a candidate, committee or political party, the court recently [ditched restrictions](https://www.usatoday.com/story/news/politics/2014/04/02/supreme-court-campaign-finance-mccutcheon-fec/7228237/) on the total amount you can apportion among those recipients. That means you can give to as many campaigns as you like.  
  
  
Symbolic Speech

Sometimes speech is spoken or written. Sometimes speech is symbolic or an action.   
  
**Symbolic speech** is conduct that expresses an idea. Sit-ins, flag waving, demonstrations, and wearing political buttons are examples of symbolic speech. While most forms of conduct could be said to express ideas in some way, only some conduct is protected as symbolic speech.  
  
**In analyzing such cases, the courts ask whether the speaker intended to convey a particular message and whether it is likely that the message was understood by those who viewed it.**   
  
To convince a court that symbolic conduct can be prohibited or punished and not protected as speech, the government must show it has an important reason for prohibiting it.   
  
However, the reason cannot be that the government disapproves of the message conveyed by the symbolic conduct. So, just as there are limitations on the extent to which “free speech” applies to the spoken word, there are restrictions on the actions that people seek to have protected as symbolic speech.

Is all Speech Free?

The freedom of speech clause of the First Amendment guarantees the right to express information and ideas. On its most basic level, it means a person can express an opinion without fear of censorship by the government, even if that opinion is an unpopular one. It protects all forms of communication: spoken words, books, art, newspapers, music, telecommunications, social media, and more.

However, this protection does not mean someone can say anything they want, wherever they want, or whenever they want. Speech that is not protected includes:

* fighting words—words that cause distress or incite violence
* obscene expressions
* lies told about someone that results in damage to their reputation

**DIRECTIONS: Examine the actions and based on the information you have just read, determine if each action listed is a form of constitutionally protected "symbolic speech." In the last column, provide a rationale for your response.**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Action** | **Check if applicable (✓)** | | |  |
| **Conveys Message** | **Message Understood by Viewer** | **Action by the Gov’t for an Important Gov’t Reason** | **Is the action a form of constitutionally protected “Symbolic speech?”**  **Why/Why Not? (Answers Should be in 2+ Sentences EACH)** |
| Case #1: In order to protest against a former employer, a person joins a picket line. State law says picketing is illegal. The person is arrested and fined $100. |  |  |  |  |
| Case #2: A person burns a draft card to express opposition to the war. Federal law says that burning draft cards is a crime. |  |  |  |  |
| Case #3: In 1996, an NBA player refuses to stand for the national anthem in protest the war with Iraq which The NBA suspended Abdul-Rauf for his refusal to stand, costing him $31,707 per missed game. against improper use of the flag. |  |  |  |  |
| Case #4: New Hampshire’s state motto—"Live Free or Die”—appears on license plates. A person covers “or Die” on the grounds that it goes against their religious and political beliefs. They are convicted of violating a state law, fined, and sentenced to jail time. |  |  |  |  |
| Case #5: An organization applies for a permit to hold a demonstration on the National Mall. Members plan to erect “tent cities” to demonstrate the plight of the homeless. The permit was denied on the grounds that camping is forbidden on the Mall. |  |  |  |  |
| Case #6: A person taped a peace symbol to an American flag and then hung the flag upside down in the window of their apartment. An upside-down flag is typically a symbol of distress or danger. This person believed the nation was in trouble. They were arrested and convicted of violating a state law against improper use of the flag. |  |  |  |  |

DIRECTIONS: Research EACH case on the preceding case and: Record the Name of the “Real Case”, the ruling of the court, and the Court’s rationale for its ruling.

|  |  |  |
| --- | --- | --- |
| CASE: Name of ‘Real” Court Case/Scenario | Ruling (if one): i.e 8-1/7-2/6-3 For \_\_\_\_ | Rationale For Ruling |
| Case #1: |  |  |
| Case #2: |  |  |
| Case #3: |  |  |
| Case #4: |  |  |
| Case #5: |  |  |
| Case #6: |  |  |

BONUS: I: A student works for a fast food restaurant. The restaurant will not allow any of its employees to post political notices on the bulletin board in the back. Have the employees’ rights to free speech been violated. How would this Case be decided based on your knowledge of student speech jurisprudence?  
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BONUS: II: In response to increasing racial tensions on campus, school officials banned images of the Confederate flag from their high school.   A group of students filed suit saying they should be allowed to wear t-shirts to school depicting the Confederate flag to show their pride in their Southern heritage. How would this Case be decided based on your knowledge of student speech jurisprudence?

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